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Significant evolution in case law: the nullity of the intra-group mobility clause

(Decision of the Labor Chamber of the *Cour de Cassation* dated September 23, 2009)

Case law with regard to mobility clauses keeps evolving. The decision rendered by the Labor Chamber of the *Cour de Cassation* (French Supreme Court) is significant in its focus on the scope thereof: the group, which is a notion that is vague and fluctuating in French labor law. It now appears that although the group has obligations with regard to the employee of all the companies attached thereto, more specifically in terms of redeployment, these same employees cannot have any obligation towards this group, even if they have expressly committed themselves by accepting an intra-group mobility…

1. The facts of the case:

An employee was promoted and therefore signed an amendment to his employment contract in which he accepted a mobility clause. This clause set forth that (i) he could be required to carry out his duties in any other company of the group and (ii) if this clause was enforced, it would result in a new employment contract with the host company while maintaining his seniority. The employee later refused a transfer, which was to be accompanied by financial benefits in terms of salary and assistance in finding housing. Consequently, his employer initiated a dismissal procedure for failure to comply with the mobility clause.

2. The reasoning:

Although the employee challenged the applicability of the mobility clause because of its vagueness in terms of geographic scope, the *Cour de Cassation* did not rule on this ground. Rather, it set forth the principle that "*an employee may not accept a change of employer in advance*" pursuant to Article L. 1222-1 of the French Labor Code which states that: "*the employment contract is signed in good faith*".

The Court's reasoning is therefore surprising, to say the least, especially in the case of a promotion for which mobility seems to be partial if not full consideration.

Further, the Court specifies that: "***the mobility clause*** *by which the employee, bound by an employment contract, undertakes to accept any transfer within another company, even though this company belongs to the*

same group or the same 'economic and social unity'[1]*, is* ***null and void****".*

3. The practical consequences:

Companies belonging to a group implementing this type of mobility clause, which had been legal as long as the geographic scope was precisely defined when the clause was drafted and insofar as there was no abuse of power in implementing it, are now defenseless since intra-group mobility clauses have been declared null and void.

There is no way in which to enforce the clause. If an employer dismisses an employee who refuses to be transferred, the employer will be sanctioned for dismissal without cause.

The *Cour de Cassation*'s reasoning is based on a general and absolute principle resulting purely and simply in the nullity of the clause. The Court provides no other possible outcome.

This begs the question: how is it that an employee can require the enforcement of his intra-group mobility to preserve employment within such group, but the group cannot require him to be transferred even though he had already agreed to the mobility clause?

Groups must therefore find other means in which to transfer their personnel. Although secondment or employee lending, set forth in standard and compliant mobility clauses, may be an option to secure the physical presence of an employee at a desired location, they can be inconvenient in terms of financial and administrative management of the concerned employee. As such, groups will have to negotiate each intra-group transfer on a case-by-case basis, and only when they wish to transfer an employee, not earlier.

To date, the only case in which transfers are authorized are those falling under the scope of Article L. 1224-1 of the French labor code, which requires the transfer of an employee's employment contract in the case of a change in the legal organization of the employer, notably by way of a merger or acquisition.

Intra-group international mobility clauses, which result in a change of employer as well as a change in the applicable law, can clearly be challenged more easily because these two changes are fundamental modifications to the contractual relationship.

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[1] An economic and social unity or *"unité économique et sociale (UES)"* is a specific concept under French labor law. Generally, two or more legally distinct companies may be considered a UES if they have the same management and interests and have similar or complementary activities, and if their employees have the same working conditions. The effect is that all companies of a UES are viewed as one company for purposes of employee representation and mandatory share profit plan(s). The UES will not become employer of all

employees, one company will not become co-employer of other employees, etc. A UES is recognized either by agreement signed by all concerned employers and unions or by decision of the court.

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